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SUPREME COURT, U.S.

NO. 81-6304

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROGER COLLINS,

Petitioner,

v.

WALTER D. ZANT,
SUPERINTENDENT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

The death penalty was properly imposed and reviewed in light of Godfrey v. Georgia, 446 U.S. 961 (1980).

2.

Georgia law allows the jury to consider a broad range of mitigating evidence, and does not require specification.

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PART ONE

STATEMENT OF THE CASE

Roger Collins was convicted in the Superior Court of Houston County, Georgia, for raping and bludgeoning to death Delores Luster. He was sentenced to die for the murder; imprisonment for fifteen years was imposed for the rape. (R. 54-55, 60). A codefendant, William Durham, was separately tried and convicted; he was given consecutive sentences of life and fifteen years.

Collins' conviction and sentence were affirmed by the Supreme Court of Georgia in Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979). The evidence adduced at Collins' trial, recounted in the appellate decision, was that Collins (1) coerced his victim into the automobile under a pretext of carrying her home, (2) threatened her if he contracted a veneral disease, (3) upon reaching the pecan orchard where the crimes were committed removed the rear seat from the automobile, (4) was the first to rape her, (5) removed from the automobile's trunk a jack and, with the weapon, followed as his codefendant led the victim down a dirt road away from where she had been raped, (6) returned to the car following the murder with blood-spattered feet, (7) instructed his cohorts to lie about the blood should anyone ask, (8) left his thumbprint on the murder weapon, and (9) ultimately admitted raping the victim and hitting her over the head with the jack. Collins v. State, supra, at 291-93.

Collins petitioned this Court for a writ of certiorari which, on May 27, 1980, was granted and the case was remanded to the Supreme Court of Georgia for reconsideration in the light of Godfrey v. Georgia, 446 U.S. 961 (1980). Collins v. Georgia, Case No. 79-5188. On remand, upon reconsideration, the Supreme Court of Georgia unanimously affirmed. Petitioner thereafter

sought review in this Court which was denied on January 12, 1981. Collins v. Georgia, Case No. 80-5672.

Collins thereafter filed a petition for habeas corpus relief in the Superior Court of Butts County, Georgia, which was denied on August 20, 1981. The Supreme Court of Georgia also denied the application for a certificate of probable cause to appeal. (Collins v. Zant, Application No. 1795, denied December 3, 1981.) From the denial of relief in the courts of the State of Georgia, Collins petitions this Court again for review.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

I. THE DEATH PENALTY WAS PROPERLY IMPOSED AND REVIEWED IN LIGHT OF GODFREY v. GEORGIA, 446 U.S. 961 (1980).

The first issue presented for this Court's review is substantially the same as was presented when Collins petitioned this Court for review of his direct appeal. Essentially, he claims that the trial court did not sufficiently instruct on an aggravating circumstance and that the review conducted by the Supreme Court of Georgia was inadequate. Petitioner argues that review by the Supreme Court of Georgia on remand does not cure what he claims was an insufficiently guided jury. The implication is review by the Supreme Court of Georgia is, in effect, a de novo sentencing and the appropriate course of action would be to order new jury sentencing. If that is Petitioner's assertion, it is without support. Upon initially reviewing Petitioner's death sentence, the Supreme Court of Georgia considered the death penalty as it is required to do under Georgia law. Ga. Code Ann. § 27-2537. As required, the review was conducted. In remanding, this Court did not order the original death sentence vacated; rather, the Court vacated the judgment of the state appellate court dealing with sentence review. Therefore, on remand, the Supreme Court of Georgia was merely reconducting its appellate review of the death penalty. The state court did not reimpose the death sentence but merely reaffirmed the death sentence already imposed by the trial jury.

Petitioner contends this Court should grant certiorari to consider whether the Supreme Court of Georgia construed Ga. Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. Petitioner

seeks to discredit the Supreme Court of Georgia on remand by asserting that the state court merely found factual differences between this case and Godfrey. Yet the distinguishing of factual matters is the primary means of avoiding the arbitrary and capricious inflicting of the death penalty; only in considering the facts of each case can courts restrict the death penalty to those factual settings which justify it.

Contrary to Petitioner's assertions, since this Court decided Godfrey, the Supreme Court of Georgia has gone to great lengths to make its appellate review an elaborate and detailed process by examining each case, including the facts surrounding the offense, thoroughly. As this Court is aware, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), the court in detail defined and explained the seventh aggravating circumstance.

In considering Petitioner's death sentence on remand in light of Godfrey, the Supreme Court of Georgia found material differences between Godfrey and Collins which distinguished Collins' act from those cases in which the death penalty is not appropriate:

> . . . The evidence in this case clearly establishes the victim was not related to the appellant. She was not threatening the appellant nor was she causing any emotional trauma to him. The appellant left the scene and attempted in every manner to avoid prosecution for his crime.
>
> As set out in the original opinion, the autopsy report showed that while

> the victim had died relatively instantaneously from a massive head injury, she also had been raped and sodomized. The evidence shows she had been sexually abused by appellant and his two codefendants prior to death. [Citations omitted.]
>
> Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra. Serious sexual abuse may be found to constitute serious physical abuse. [Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980)] A defendant who tortures the victim before killing the victim can be found to have a depraved mind. Hance v. State, supra.
>
> Accordingly, this court holds that the present jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey that, beyond a reasonable doubt, the murder of the victim was of a type universally condemned by civilized society as "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." [Citation omitted.]

Collins v. State, 246 Ga. 261, 261-62, 271 S.E.2d 352 (1980). Additionally, the Supreme Court of Georgia found:

> . . . This case is also of the type wherein the sentence of death rests only partially upon Ga. Code Ann. § 27-2534.1(b)(7). The jury returned a finding of two statutory aggravating circumstances. Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, supra, the Supreme Court of the United States was concerned exclusively with a sentence of death resting only upon Code Ann. § 27-2534.1(b)(7). Godfrey v. Georgia, 446 U.S. [961] (1980).
>
> Therefore, under our decisions, the death penalty may also be upheld upon § 27-2534.1(b)(2). [Citations omitted.]

Id. at 262.

As for the adequacy of the instructions given the jury by the trial court, the trial court instructed in the language of Ga. Code Ann. § 27-2534.1(b)(7). In other cases, the Supreme Court of Georgia has recognized that with the exception of the term "aggravated battery," the remainder of the terms contained under section (b)(7) requires no explication. See, e.g., Gilreath v. State, 247 Ga. 814, 836, 279 S.E.2d 650 (1981); Stevens v. State, 245 Ga. 583, 586, 266 S.E.2d 194, cert. denied, ___U.S.___, 101 S.Ct. 251 (1980).

In Hance v. State, supra, the Supreme Court of Georgia found that the terms used in section (b)(7) are "words of common understanding, [having] essentially the same meaning, and are included in the statute to distinguish ordinary murders for which

the penalty of death is not appropriate, from those murders for which the death penalty may be imposed." Id. at 861. In the present case, the jury was not instructed to consider aggravated battery, hence no explication of that term was necessary.

Because of the simplicity of the terms used in section (b)(7), it was not necessary for the trial court to give further definitions of terms which the jury could readily understand.

Because the jury instructions in this case were proper, and because the review conducted by the Supreme Court of Georgia was adequate, this issue presents no reason for granting certiorari.

II. GEORGIA LAW ALLOWS THE JURY TO CONSIDER A BROAD RANGE OF MITIGATING EVIDENCE, AND DOES NOT REQUIRE SPECIFICATION.

In his second enumeration, Petitioner contends that Georgia law should be rewritten to require the jury to list the mitigating circumstances it considered. The absence of such specific listing, according to Petitioner, prevents the Supreme Court of Georgia on review from adequately considering the "jury's exercise of discretion." Such an argument assumes the function of a reviewing court on appeal is something that it is not. It is not the province of any reviewing court to enter the jury room and deliberate with the jury, to weigh the evidence considered by the jury, or to determine whether the jury gave too much or too little consideration to any factor.

As Petitioner himself apparently recognizes, it is during this phase of the sentencing deliberations that the jury exercises its discretion, albeit with some guidance, in determining what punishment is appropriate considering the circumstances of the crime and the criminal.

What this Court has held in previous cases is that relevant sentencing information, including mitigating evidence, should not be excluded from the jury's consideration. See, e.g., Green v. Georgia, 442 U.S. 95 (1979); Lockett v. Ohio, 438 U.S. 586 (1978).

As the Court noted in Lockett, supra:

> . . . the statute permitted the jury "to consider any aggravating or mitigating circumstances . . . and that

> the Georgia Supreme Court had approved "open and far-ranging argument" in presentence hearings . . . .

Id. at 606. The Georgia Legislature has elected to permit "the jury to dispense mercy on the basis of factors too intangible to write into a statute." Lockett, supra at 606, n. 14, quoting Gregg v. Georgia, 428 U.S. 153, 222 (1976).

Neither has this Court stated in the recent decision of Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982), that certain mitigating circumstances must be presented to the jury. On the contrary, this Court merely ruled that the sentencing body, whether it be a judge or jury, could not be precluded from considering any mitigating factor as a matter of law. That, in effect, was the holding in Lockett, supra.

In the present case, the trial court instructed the jury to:

> consider whether there are mitigating circumstances that would incline one to a recommendation of life imprisonment in spite of the aggravating circumstances. Mitigating circumstances are those which do not constitute a justification or excuse for the offense but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame. The youthful age of defendant is, for example, a mitigating factor which you might consider.

(T. 378)

Thus, the jury was appropriately instructed by the trial court to consider mitigating evidence and it must be assumed that the jury followed these correct instructions. An appellate court should do no more than insure that the evidence before the jury is proper, that no appropriate evidence has been excluded, and that the instructions given to the jury are correct. All those occurred in this case; the second ground presents no reason for granting the writ of certiorari.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF TIMELY FILING

PURSUANT TO RULE 28(2)

I, Daryl A. Robinson, a member of the Bar of this Court and counsel of record in Case No. 81-6304, Collins v. Zant, hereby certify in accordance with Rule 28(2) of the Rules of this Court that on April 1, 1982, there was deposited in the United States Post Office, Capitol Hill Annex, with sufficient postage prepaid, Respondent's brief in opposition addressed to Honorable Alexander Stevas, Clerk, Supreme Court of the United States.

Both the response filed with this Court and the service copy to counsel for Petitioner were mailed within the permitted time.

This 1st day of April, 1982.

Daryl A. Robinson

DARYL A. ROBINSON

Sworn to and subscribed before me
this 1st day of April, 1982.

NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia State at Large
My Commission Expires Nov. 16, 1984